

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOWARD WEBB, ) No. C 02-1220 PJH (PR)  
Petitioner, )  
vs. ) ORDER DENYING PETITION  
GEORGE M. GALAZA, ) FOR WRIT OF HABEAS  
Respondent. ) CORPUS

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has filed a traverse. The petition is now before the court for ruling.

## BACKGROUND

A Monterey County jury convicted petitioner of two counts of committing lewd acts upon a child under the age of fourteen. See Cal. Penal Code § 288(a). With enhancements, he was sentenced to prison for sixty years to life. His conviction and sentence were affirmed by the California Court of Appeal<sup>1</sup> and he did not seek review.

<sup>1</sup> Appellate counsel filed a “Wende brief.” In People v. Wende, 25 Cal. 3d 436 (1979), the California Supreme Court established a procedure for those cases which appellate counsel believes to be frivolous. Counsel, upon concluding that an appeal would be frivolous, files a brief with the appellate court that summarizes the procedural and factual history of the case. Counsel also attests that he or she has reviewed the record, explained the evaluation of the case to the client, provided the client with a copy of the brief, and informed the client of the client’s right to file a pro se supplemental brief. Counsel further requests that the appellate court independently examine the record for

1       However, he did file state habeas petitions with the Monterey County Superior Court, the  
 2       California Court of Appeal and the California Supreme Court, all of which denied the  
 3       petitions.

4                  As grounds for habeas relief, he asserts that: (1) His trial counsel was ineffective  
 5       in that he failed to perform an adequate investigation; (2) his trial counsel was ineffective  
 6       in failing to prepare a defense; and (3) the evidence was insufficient to prove his  
 7       convictions beyond a reasonable doubt.

8                  Petitioner was charged with molesting a child, Candace Boyd. Petitioner was  
 9       the live-in boyfriend of Linda Hill, who is the mother of Candace. Ex. 3 (Reporter's  
 10      Transcript) at 26-30, 98. All three lived in the same home with Candace's two brothers.  
 11      Id. at 26-28, 98. Candace was nine-years old at the time of the offenses. Id. at 25, 27.

12                 In the first incident, petitioner was accused of molesting Candace when she was  
 13       sleeping on the bottom bunk of her bed with her three cousins. See id. at 31-34. A  
 14       brother was sleeping in the upper bunk. Id. at 31. Candace awoke to find petitioner on  
 15       his knees beside her bed. Id. at 33. She fell back asleep, awoke again, but did not  
 16       open her eyes. Id. at 33. She felt petitioner's penis rubbing against her leg, making  
 17       skin-to-skin contact. Id. at 34. After a short while petitioner stopped and went away. Id.  
 18       at 34-35. Candace lay there for a while, too scared to move, then got into the upper  
 19       bunk with her brother for a while. Id. at 35. The next day Candace told her mother about  
 20       the incident, but her mother could not believe what happened and said to Candace,  
 21       "Probably you're dreaming." Id. at 36-37, 101. Candace testified that she replied,  
 22       "Probably." Id. at 37. Her mother, on the other hand, testified that Candace said "no" to  
 23       her suggestion that she must have been dreaming. Id. at 101. Her cousin April, who

---

25       arguable issues. See Smith v. Robbins, 528 U.S. 259, 265 (2000) (citing Wende). The  
 26       appellate court, upon receiving a "Wende brief," conducts a review of the entire record  
 27       and affirms if it finds the appeal to be frivolous. If, however, it finds an arguable (i.e.,  
 nonfrivolous) issue, it orders briefing on that issue. Id. at 266.

1 was present at the time said, "Maybe you were." Id. at 102. When asked at trial if she  
 2 thought she had dreamed the incident, Candace replied, "It really happened." Id. at 37.

3 The second incident occurred when Candace came back from church and went  
 4 to her bedroom and turned on her television, with the volume off. Id. at 39-41. Candace  
 5 watched television for a while and then fell asleep. Id. at 41. Petitioner was accused of  
 6 molesting her when he went to turn off the television. See id. at 42, 44-46, 67-68.

7 After the second incident, Candace's mother brought her to a hospital for  
 8 examination. Id. at 122-123. Dr. Fitzgerald used a rape kit on Candace and performed  
 9 a direct visual examination. Id. at 135. Dr. Fitzgerald did not use a speculum or a  
 10 colposcope. Id. at 135, 140. She testified that there were no bruises or abrasions. Id.  
 11 at 139. Although there were no physical findings in her report, her observations could  
 12 still be consistent with what Candace had told her about the molestation. Id. at 137.

13 The following day, Dr. Barnes, a pediatrician, examined Candace. Id. at 77. Dr.  
 14 Barnes used a colposcope for examination. Id. at 78. Dr. Barnes testified that there  
 15 was redness of the labia minora. Id. at 78-79. The redness suggested a friction injury,  
 16 which was consistent with penetration by a finger and a penis. Id. at 81-82, 84. Further,  
 17 Dr. Barnes found internal injuries consistent with both digital and penile penetration. Id.  
 18 at 91-92. There was marked redness and increased vascularity below and around the  
 19 hymen and in the vagina and the cervix. Id. at 79. She also observed redness on the  
 20 vaginal walls and the posterior fossa. Id. at 80. The color of the tissues was described  
 21 as "beefy red" when they should have been bright pink. Id. at 80. The positioning of the  
 22 redness of the labia minora was consistent with digital penetration because the majority  
 23 of the injury occurs to the upper portion of the genital structures due to the fact that a  
 24 finger enters at a different angle than a penis. Id. at 91-92.

25 Further facts will be set out in the discussion below.

26 **DISCUSSION**

1      A. Standard of review

2      A district court may not grant a petition challenging a state conviction or sentence  
 3      on the basis of a claim that was reviewed on the merits in state court unless the state  
 4      court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or  
 5      involved an unreasonable application of, clearly established Federal law, as determined  
 6      by the Supreme Court of the United States; or (2) resulted in a decision that was based  
 7      on an unreasonable determination of the facts in light of the evidence presented in the  
 8      State court proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions  
 9      of law and to mixed questions of law and fact, Williams (Terry) v. Taylor, 529 U.S. 362,  
 10     407-09 (2001), while the second prong applies to decisions based on factual  
 11     determinations, Miller-El v. Cockrell, 123 S.Ct. 1029, 1041 (2003).

12     A state court decision is "contrary to" Supreme Court authority, that is, falls under  
 13     the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to  
 14     that reached by [the Supreme] Court on a question of law or if the state court decides a  
 15     case differently than [the Supreme] Court has on a set of materially indistinguishable  
 16     facts." Williams (Terry), 529 U.S. at 412-13. A state court decision is an "unreasonable  
 17     application of" Supreme Court authority, falls under the second clause of § 2254(d)(1), if  
 18     it correctly identifies the governing legal principle from the Supreme Court's decisions  
 19     but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413.  
 20     The federal court on habeas review may not issue the writ "simply because that court  
 21     concludes in its independent judgment that the relevant state-court decision applied  
 22     clearly established federal law erroneously or incorrectly." Id. at 411. Rather, the  
 23     application must be "objectively unreasonable" to support granting the writ. See id. at  
 24     409.

25     "Factual determinations by state courts are presumed correct absent clear and  
 26     convincing evidence to the contrary." Miller-El, 123 S.Ct. at 1041. This presumption is  
 27

1 not altered by the fact that the finding was made by a state court of appeals, rather than  
2 by a state trial court. Sumner v. Mata, 449 U.S. 539, 546-47 (1981). A petitioner must  
3 present clear and convincing evidence to overcome § 2254(e)(1)'s presumption of  
4 correctness; conclusory assertions will not do. Id.

5 Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual  
6 determination will not be overturned on factual grounds unless objectively unreasonable  
7 in light of the evidence presented in the state-court proceeding." Miller-El, 123 S.Ct. at  
8 1041.

9 When there is no reasoned opinion from the highest state court to consider the  
10 petitioner's claims, the court looks to the last reasoned opinion, which in this case is the  
11 superior court's ruling on petitioner's state petition for habeas corpus. Ylst v.  
12 Nunnemaker, 501 U.S. 797, 801-06 (1991).

13 B. Issues Presented

14 Petitioner asserts that he was denied effective assistance of counsel when his  
15 trial counsel failed to (1) investigate the case and interview witnesses, and (2) "present  
16 a defense." Although his arguments in the petition are grouped under these headings,  
17 in fact they consist of a number of separate arguments or claims, not all of which  
18 necessarily go where he has placed them – for instance, he complains of counsel's  
19 cross-examination of a doctor, among other things, under the "failure to investigate"  
20 heading. Nevertheless, the court discusses each contention below under the heading  
21 petitioner has used.

22 1. Standard

23 A claim of ineffective assistance of counsel is cognizable as a claim of denial of  
24 the Sixth Amendment right to counsel, which guarantees not only assistance, but  
25 effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984).  
26 The benchmark for judging any claim of ineffectiveness must be whether counsel's  
27

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

In order to prevail on a Sixth Amendment ineffective assistance of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. Id. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. Id. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (applauding district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice), cert. denied, 516 U.S. 1124 (1996).

## 2. Failure to investigate

A defense attorney has a general duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strickland, 466 U.S. at 691. The duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). A claim of failure to interview a witness cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986). A defendant's mere speculation that a witness might have given helpful information if interviewed is not enough to establish ineffective assistance. Bragg v. Galaza, 242 F.3d 1082, 1087 (9th Cir.), amended, 253 F.3d 1150 (9th Cir. 2001).

1       Here, petitioner provides no more than speculation as to what an investigation  
2 might have revealed. For instance, he contends that interviews with “family members”  
3 might have revealed evidence of the witness’ “vindictiveness,” “but gives no hint that  
4 such evidence exists, nor does he specify what sort of evidence it might be. Pet.  
5 (typewritten attachment to form petition) at 4.

6       The only specific assertion he provides is his claim that his counsel failed to  
7 interview and call the victim’s cousin, April, to testify that the first incident never  
8 occurred. He claims that “nothing presented a more true version of the event than the  
9 actual witness, April.” However, the only evidence in the record suggests that April and  
10 the other relatives were asleep when the first molestation occurred. Ex. 3 at 33, 36.  
11 April’s comment, “Maybe you were” regarding the possibility that Candace had  
12 dreamed of the incident, and Candace’s agreement with April’s speculation, a strong  
13 defense point, were in evidence. If anything, calling April might have damaged the  
14 defense case, because it would have given her an opportunity to explain her comment;  
15 there would have been a risk, for instance, that she would say that her comment had  
16 been, as it appears on its face, pure speculation.

17       Petitioner has not provided any evidence that April had anything further to add.  
18 Thus, petitioner’s counsel’s performance was not deficient in failing to interview and call  
19 April to testify.

20       Petitioner also contends that his counsel failed to investigate the reports of the  
21 two doctors who testified at trial “to check their [sic] veracity.” He does not explain what  
22 he means by this contention nor, even in general terms, what such an investigation  
23 would have turned up. This is not sufficient to establish ineffective assistance.

24       Petitioner also contends that it was ineffective for his counsel to hint that the red  
25 bruised area observed by Dr. Barnes might have been caused by Dr. Fitzgerald’s use  
26 of a speculum, without prior knowledge of what instruments Dr. Fitzgerald used in her

1 exam. Counsel asked Dr. Barnes if the redness could have been caused by use of a  
2 speculum, and Barnes said it was not clear whether Dr. Fitzgerald had used a  
3 speculum, and that if one were mishandled, it could have caused the bruising. Ex. 3 at  
4 87-88. When Dr. Fitzgerald subsequently testified she said she had not used a  
5 speculum. Id. at 135. Nothing was made of this, however; neither side used it in  
6 closing. See id. at 223-56. Given that Dr. Fitzgerald's testimony that she had not used  
7 a speculum came after Dr. Barnes' testimony, and with the victim's mother's rather  
8 dramatic testimony in between, and that counsel did not link up the two points in  
9 argument, it is not reasonably probable that counsel's asking that question affected the  
10 outcome.

11       3.     Failure to present a defense

12       Petitioner also contends that he was denied effective assistance of counsel  
13 because his attorney "prepared no defense." Again, there simply is no evidence of this,  
14 and in fact counsel did put on a defense. He effectively established in cross-  
15 examination that the victim disliked petitioner, ex. 3 at 161-63; 177-78; he put petitioner  
16 on the stand to deny the abuse, id. at 191, 203; got Dr. Barnes, a very uncooperative  
17 witness, to say that "one often thinks children are not telling the truth" and that the  
18 physical signs could have been caused by something other than abuse, id. at 89, 92;  
19 and argued in closing that there was no conclusive physical evidence of abuse, that the  
20 victim had a motive to lie, and that there were inconsistencies in the testimony. Id. at  
21 230-49.

22       Among other things, petitioner asserts that counsel failed to explore a defense  
23 involving the victim's history and her vindictiveness. However, counsel vigorously cross-  
24 examined the victim regarding whether she hated petitioner and wanted to get him out  
25 of the house, id. at 161-63; established the same point with the victim's mother on cross  
26 ("None of [the children] really cared for him"), id. at 151-52, and reinforced it with the  
27  
28

1 victim's statements to an investigating officer that she disliked petitioner. Id. at 177-78.

2 Petitioner also claims that his counsel failed to present a defense that the  
3 incident never occurred because there was no physical or scientific evidence pointing to  
4 his guilt. This is not strictly correct, as Dr. Barnes testified to physical signs of abuse. Id.  
5 at 78-82, 84. However, on cross-examination of Barnes counsel established that her  
6 observations were consistent with no abuse having occurred. Id. at 92.

7 Petitioner also asserts that a "Dr. Avila" should have been called as an expert  
8 witness to testify about his forensic findings and the improbability of the act ever having  
9 occurred. Pet. at 8-9. Dr. Avila apparently was on the prosecution's witness list to be  
10 called if there was usable evidence from the hospital sheet on which the victim was  
11 undressed. Ex. 3 at 7-10. Expert testimony is necessary when lay persons are unable  
12 to make an informed judgment without the benefit of such testimony. Caro v. Calderon,  
13 165 F.3d 1223, 1227 (9th Cir. 1999). Where the evidence does not warrant it, the  
14 failure to call an expert does not amount to ineffective assistance of counsel. Wilson v.  
15 Henry, 185 F.3d 986, 990 (9th Cir. 1999) (a decision not to pursue testimony by a  
16 psychiatric expert is not unreasonable when the evidence does not raise the possibility  
17 of a strong mental state defense). Here it was not necessary to call an expert to explain  
18 the negative results of the rape kit, because the meaning would have been clear to a lay  
19 person -- that the rape kit, unlike the doctor's examination, did not provide physical  
20 evidence of abuse, thus tending to show that the abuse did not occur. Dr. Barnes  
21 testified that the absence of physical evidence of abuse, such as semen or pubic hairs,  
22 did not change her opinion that abuse had occurred. Id. at 97. Petitioner fails to show  
23 that Dr. Avila's testimony would have been any different, in which case counsel's best  
24 strategy was to minimize the amount of expert testimony which tended to explain away  
25 the absence of evidence from the rape kit, then argue the common-sense approach in  
26 closing that if there was no physical evidence, the abuse did not occur. Failure to call  
27

1 the prosecution's witness when the rape kit proved negative was not ineffective  
 2 assistance.

3 Petitioner also asserts that counsel should have declined to stipulate to the  
 4 negative results of the rape kit. However, counsel made effective use of this in closing;  
 5 although it might have been more effective to present this evidence by way of a testifying  
 6 witness, that, as always, would also introduce uncertainties and risks. In this context, at  
 7 least, the decision to stipulate was not ineffective.

8 Petitioner has failed to show that his counsel was ineffective. Therefore, the  
 9 state appellate courts' rejection of this claim was not contrary to, or an unreasonable  
 10 application of, clearly established United States Supreme Court authority.

11       3.     Sufficiency of the evidence

12 Petitioner contends that there was insufficient evidence to support the conviction.

13 A state prisoner who alleges that the evidence in support of his state conviction  
 14 cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt  
 15 beyond a reasonable doubt states a constitutional claim, Jackson v. Virginia, 443 U.S.  
 16 307, 321 (1979), which, if proven, entitles him to federal habeas relief. Id. at 324. A  
 17 federal court reviewing collaterally a state court conviction does not determine whether it  
 18 is satisfied that the evidence established guilt beyond a reasonable doubt. Payne v.  
 19 Borg, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S. 843 (1993). The  
 20 federal court "determines only whether, 'after viewing the evidence in the light most  
 21 favorable to the prosecution, any rational trier of fact could have found the essential  
 22 elements of the crime beyond a reasonable doubt.'" Id. (quoting Jackson, 443 U.S. at  
 23 319).

24 Petitioner contends that the evidence was insufficient because there was no  
 25 scientific evidence -- semen, pubic hairs -- to support it. As the previous paragraph  
 26 reflects, that is not the standard. Here, the verdict was supported by the testimony of the

1 victim and physical evidence testified to by Dr. Barnes.

2 Petitioner admitted that the victim was an honest child and he could think of no  
 3 reason why she would make such allegations against him. Ex. 3 at 204, 206. Although  
 4 he alleged that the victim's mother was behind her making these allegations, he could  
 5 not offer credible proof that she was. Id. at 205-206. Rather, the evidence showed that  
 6 the victim's mother did not want to believe that petitioner molested her daughter and did  
 7 not immediately report him to police. See id. at 101. In addition to petitioner's  
 8 acknowledgment that the victim was an honest child, the victim's credibility is sustained  
 9 by her account of the second incident, which is consistent with the physical evidence.

10 The victim testified that with regard to the second incident, petitioner molested  
 11 and sexually assaulted her when she came back from church and went to her bedroom.  
 12 Id. at 39-46. The victim's story is consistent with the findings of Dr. Barnes, a  
 13 pediatrician for seventeen years who specialized in examining child victims of sexual  
 14 assault, having examined approximately 1200 of them. Id. at 75. Barnes, who  
 15 examined the victim with a colposcope, found an external injury. Id. at 76, 78-79. She  
 16 observed the victim had a redness of the labia minora which she felt was caused by  
 17 friction from the penetration of a finger or penis. Id. at 80-84. Further, Barnes found  
 18 internal injuries consistent with both digital and penile penetration. Id. at 91-92.  
 19 Specifically, there was marked redness and increased vascularity below and around the  
 20 hymen and in the vagina and the cervix. Id. at 79. She also observed redness on the  
 21 vaginal walls and the posterior fossa. Id. at 80. The color of the tissues was described  
 22 as "beefy red" when they should have been bright pink. Id. at 80. The positioning of the  
 23 redness of the labia minora was consistent with digital penetration because the majority  
 24 of the injury was to the upper portion of the genital structures due to the fact that a finger  
 25 enters at a different angle than a penis. Id. at 91-92.

26 In addition to Barnes' testimony, the victim's mother testified that petitioner was  
 27

1 not in bed beside her when she woke up. Id. at 109. At that point, she hollered his  
2 name and looked down the hall. Id. She saw him coming out of the victim's bedroom,  
3 trying to shut his robe. Id. at 111. She called his name four times before she saw him  
4 come out of her daughter's bedroom. Id. She asked him what he was doing in her  
5 daughter's room. Id. at 112. She testified that he did not look at her and replied that he  
6 was seeing what the victim was doing. Id.

7 Petitioner's lack of credibility was displayed when Officer Gray testified that  
8 petitioner claimed he did not know why he was being arrested, when in fact the victim's  
9 mother had confronted him with allegations of his molestation. Id. at 121, 128.

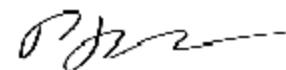
10 A rational trier of fact could find that there was sufficient and credible evidence to  
11 prove petitioner's conviction beyond a reasonable doubt, even in the absence of  
12 scientific evidence. Accordingly, the decision of the state court was neither contrary to  
13 nor involved an unreasonable application of clearly established federal law as  
14 determined by the Supreme Court.

15 **CONCLUSION**

16 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.  
17 The clerk shall close the file.

18 IT IS SO ORDERED.

19 DATED: October 5, 2005.



20 PHYLIS J. HAMILTON  
21 United States District Judge

22 G:\PRO-SEP\JH\HC.02\ WEBB220.RUL